

INTERSTATE COMMERCE COMMISSION 04/19/96

FINANCE DOCKET # 32760

3029-3088 2+

1 JUDGE NELSON: Who is Anne Bingaman?

2 MR. STEEL: She is the Assistant Attorney
3 General for the Anti-Trust Division, Mr. Billiel's
4 boss.

5 JUDGE NELSON: But what is she doing in
6 there?

7 MR. STEEL: That's who they made the
8 presentation to.

9 JUDGE NELSON: She's in the deposition?

10 MR. STEEL: No. The presentation was a
11 document -- a clear cover document with the Velobind
12 -- we don't have one of those here, but something
13 similar to this, this type of document with a clear
14 cover. It said, "Evidence of Collusion" --

15 JUDGE NELSON: Mr. Steel is holding up a
16 document --

17 MR. STEEL: It's a sample.

18 JUDGE NELSON: -- spiral bound with black
19 plastic.

20 MR. STEEL: Right.

21 JUDGE NELSON: Is that what it looked
22 like?

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1 MR. STEEL: Perhaps with a solid binding
2 rather than a spiral binding.

3 JUDGE NELSON: How do you know this detail
4 right down to the kind of binding?

5 MR. STEEL: If Mr. Norton and his
6 associate are there, and I'm sitting here -- excuse me
7 for a second -- and I'm reading a document out here,
8 doing this, that's how I know what it looks like.

9 JUDGE NELSON: I understood you weren't
10 even there.

11 MR. STEEL: I wasn't there.

12 JUDGE NELSON: And now you're able to tell
13 us what kind of binding that was?

14 MR. STEEL: It was, as you would imagine,
15 a notable document when held up in front of
16 Mr. Englert, who is our anti-trust lawyer about --

17 JUDGE NELSON: How do you know what color
18 the binding was?

19 MR. STEEL: I don't know what color it is.
20 I apologize. I don't know.

21 JUDGE NELSON: How do you know anything
22 about the binding?

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1 MR. STEEL: Mr. Englert told me. I --

2 JUDGE NELSON: He told you.

3 MR. STEEL: -- am prepared to bring him
4 here. We know what document it is; it was a
5 presentation to Ms. Bingaman. We know what it is. If
6 there's more than one, which now may be the case, we
7 perhaps want that as well. But for the time being --

8 MS. METALLO: Oh, well, what a --

9 MR. STEEL: -- we're doing the one -- they
10 waived its existence. They don't want to admit it.
11 They waived its existence.

12 JUDGE NELSON: I'm going to overrule that
13 argument. It's not persuasive to me. Nor am I
14 interested in some vast library of documents. I think
15 in the interest of getting this resolved I am more
16 comfortable with whatever document was there --

17 MR. STEEL: That's --

18 JUDGE NELSON: -- if there was one,
19 because we have to hear your man on it, because if
20 there was such a document it's at least open to the
21 extent that some questions came out of it, so he says.
22 Does the transcript itself show anything about a

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1 document?

2 MS. METALLO: No.

3 MR. STEEL: Ms. Metallo says no. Without
4 knowing what documents it was, she says no. I assume
5 -- I think I know, but I don't want to relay what --
6 the purpose of opening the book to get the document.
7 Mr. Englert I think knows that I'm not 100 percent
8 sure. I'd rather check that or have him tell you why
9 he thinks she --

10 JUDGE NELSON: Well, so what are the
11 thoughts of counsel here on the KCS side? Do you want
12 me to get Mr. Englert here and hear what he has to say
13 about all of this?

14 MR. STEEL: I --

15 JUDGE NELSON: Do you want some time to
16 consult?

17 MS. METALLO: No, Your Honor. I think
18 that if Your Honor will oblige us, as Mr. Billiel has
19 requested and I have requested for an in camera
20 argument, I think we can clarify this matter.

21 MR. STEEL: On the record, we want to
22 object to that, because this greatly affects all of

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1 us. These are serious allegations. They may be able
2 to produce it, and they want to tell you why --

3 MR. MULLINS: They're not relevant to this
4 proceeding, Mr. Steel. If there is something that has
5 to do with something that violated the Sherman Act, or
6 the Clayton Act, then it is completely outside the
7 jurisdiction of this --

8 JUDGE NELSON: Well, you're way ahead of
9 me.

10 MR. STEEL: If you read the arguments that
11 they made, because that's important to --

12 JUDGE NELSON: I want us to just start
13 with the first step, which is whether there is such a
14 document. And we can't seem to pin that down.

15 Is the other side willing to agree that
16 there is, in fact, a document?

17 MS. METALLO: No.

18 JUDGE NELSON: That does away with
19 Mr. Englert with all of this business then.

20 MS. METALLO: I can't, Your Honor, because
21 under Rovario (sic), if I agree, then the informant
22 privilege is lost.

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1 JUDGE NELSON: I don't know about that.

2 MS. METALLO: Well --

3 JUDGE NELSON: You can believe that, but
4 I'm not going to hold it lost.

5 MS. METALLO: I'm sure the Applicants
6 still, Your Honor --

7 MR. MULLINS: They'll stipulate --

8 MR. STEEL: We'll stipulate that that mere
9 fact doesn't --

10 JUDGE NELSON: Can we agree that if
11 Ms. Metallo agrees that there is, in fact, such a
12 document, she hasn't waived anything more than to
13 admit that there is, in fact, such a document?

14 MR. STEEL: Only by solely stating it
15 here, rather than have the deposition. But the mere
16 statement here wouldn't waive it.

17 MR. NORTON: That's correct.

18 JUDGE NELSON: Do you want to work out the
19 terms of a stipulation --

20 MS. METALLO: Yes.

21 JUDGE NELSON: -- here, and you can draft
22 something so you're protected? Work with counsel?

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1 MS. METALLO: If you will give me 60
2 seconds --

3 JUDGE NELSON: I will give more than that.
4 I think it will take more than that.

5 MR. MULLINS: Let's take a five-minute
6 recess.

7 JUDGE NELSON: Why don't we take whatever
8 time you need, and then have Ms. Metallo call my
9 office. Do you know my number here now? Do you know
10 how to get me on the telephone? 219-2550. And my
11 secretary is out today. If for any reason it doesn't
12 answer, try my law clerk on 2555, which is
13 Ms. Diciano. She is here.

14 What we want to work out here is -- may I
15 have your attention, ladies and gentlemen? It's
16 difficult enough, these issues, without all of this
17 collateral conversation. What we want to work out is
18 a stipulation which does two things. One, if it can
19 do so, agrees that there is some such document, and,
20 two, agrees that by so disclosing we're not waiving
21 anything in terms of the alleged protected nature of
22 the content of the document.

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1 And we get that done and we can then focus
2 on what the content of the document is. Maybe I can
3 see it in camera. Maybe I need to hear from counsel
4 or not. But let's see what we can do in terms of the
5 stipulation, and I'll be on call awaiting to hear from
6 you. So we'll take a recess right now.

7 (Whereupon, the off the record briefly.)

8 JUDGE NELSON: As we were about to leave,
9 and we were off the record, Mr. Norton had something
10 to say.

11 Now, let me say this to all counsel, this
12 is obviously a matter of sensitivity and concern,
13 professionally, and to some degree personally to some
14 counsel. And so I don't want to have stuff going on
15 off the record that we don't know about. If you've
16 got questions -- unless there's agreement. If you've
17 got questions, let's keep it on the record.

18 What's the problem, Mr. Norton?

19 MR. NORTON: I just wanted to confirm --
20 I understood yesterday you indicated that the
21 document, if it exists, should be here today so you
22 could examine it in camera. And I just want to

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1 understand whether that is the case.

2 (Laughter.)

3 If it exists.

4 MS. METALLO: Before we get to our
5 stipulation?

6 (Laughter.)

7 I mean, give me a break.

8 JUDGE NELSON: Well, there are two
9 possibilities -- three possibilities. One, there is
10 no such document. Two, there is one and it's here.
11 Three, there is one and it isn't here. What do we
12 care?

13 MR. NORTON: Well, it may bear on --

14 JUDGE NELSON: What do we have to now do,
15 based on --

16 MR. NORTON: -- how quickly we can proceed
17 to resolve -- for the next step, if in camera
18 inspection is the next step.

19 JUDGE NELSON: I think the quickest thing
20 to do is move forward on the stipulation of the issues
21 we've discussed, and then see where we go.

22 MR. NORTON: Okay. That's fine.

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1 JUDGE NELSON: Now, counsel know that if
2 they end up acknowledging that there is an agreement,
3 the sooner they get it in here the better. But I'm
4 available today and also Monday, if necessary.

5 I'll be in the office awaiting your call.

6 (Whereupon, the proceedings were off the
7 record from 9:58 a.m. until 10:54 a.m.)

8 JUDGE NELSON: Let's go on the record.

9 Have you got a stipulation now with regard
10 to these -- this alleged document?

11 MR. NORTON: Yes, we do.

12 JUDGE NELSON: Ms. Metallo?

13 MS. METALLO: Yes, we do, Your Honor. The
14 stipulation we've agreed to is as follows. The
15 parties stipulate that an admission today in this
16 proceeding before Judge Nelson regarding the existence
17 of the submission to the Department of Justice in
18 January 1996, on behalf of Kansas City Southern
19 Railroad, does not constitute a waiver of the
20 confidential informant's privilege, to the extent
21 otherwise applicable.

22 JUDGE NELSON: So do I read that as an

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1 acknowledgement that there is such a document that was
2 submitted to the Justice Department in January of
3 1996?

4 MS. METALLO: Yes, Your Honor. However,
5 I would like to clarify for the record that I have
6 gone back and searched my files, and we have no such
7 document that was described by Mr. Steel previously.
8 However, in the interest of moving this along, there
9 was a submission to -- we are admitting, on the basis
10 of this stipulation, the existence of a submission to
11 the Department of Justice in January of 1996.

12 JUDGE NELSON: All right. Now the next
13 question is, is that document here?

14 MS. METALLO: It is, Your Honor.

15 JUDGE NELSON: And how long is it?

16 MS. METALLO: I'd say it's about 10 pages.

17 JUDGE NELSON: What would counsel say if
18 I were to want to review it on an in camera basis?

19 MR. STEEL: That's acceptable.

20 MR. NORTON: Yeah, we have no problem with
21 that, Your Honor.

22 JUDGE NELSON: I've read the KCS filing,

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1 which seems to say if a number of things happened,
2 then there may have been violations of the anti-trust
3 laws, and it goes into some detail with these
4 hypotheses. And the hypotheses are more than mere
5 hypotheses. They appear to rest on the documents or
6 facts that are annotated and documented by reference
7 to things, as they don't look like someone's dreams.

8 The hypotheses are designed to show that
9 they, I think, are more than mere hypotheses, that
10 there is some link to fact. That's what I got out of
11 the presentation.

12 I went through Mr. Billiel's papers, and
13 I didn't really find anything on this. Did I miss
14 something there, Mr. Billiel?

15 MR. BILLIEL: I was just addressing the
16 more generic question of submissions to us, Your
17 Honor, in my letters.

18 JUDGE NELSON: I saw nothing
19 particularized about these applicants, in terms of
20 collusive conduct or conduct that may violate --

21 MR. BILLIEL: In the Department --

22 JUDGE NELSON: In your submission, yes.

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1 MR. BILLIEL: Yes, that's right. There
2 was nothing about express collusion between the
3 Applicants in any of that, nothing at all.

4 JUDGE NELSON: So if anything has opened
5 the door here, if that's the theory of discovery, it
6 would be the KCS filing, not the Department's filing.

7 MR. BILLIEL: I believe that's the theory.

8 JUDGE NELSON: So the next question is,
9 what do we do about this? I can examine the document.
10 I can -- we can move to something else on the agenda.
11 We have another hour, roughly, to use efficiently
12 here. What do the parties want me to do?

13 MR. MULLINS: Your Honor, we believe if
14 you examine the document you will clearly see that,
15 one, it's not relevant to this proceeding, and, two,
16 that it's attorney work-product, and it's given in
17 confidence to the Department of Justice. And that
18 should put an end to the issue.

19 JUDGE NELSON: So you want as the next
20 item of business for me to examine this?

21 MS. METALLO: Yes, Your Honor. Yes.

22 JUDGE NELSON: That will take time. I'd

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1 have to break and then go up and do it. I just wonder
2 if there's anything else we could get done now.

3 Mr. Streeter I don't see here. I know he
4 was up in our office looking for a fax machine to send
5 his client the letter.

6 MR. PERGOLIZZI: Your Honor?

7 JUDGE NELSON: And we showed him where it
8 was, but --

9 MR. NORTON: We have a --

10 JUDGE NELSON: Is there something else we
11 could get done?

12 MR. NORTON: We have a potential
13 stipulation that I think would resolve the problem
14 Mr. Streeter is here for, but we haven't been able to
15 talk to him to see whether it is --

16 JUDGE NELSON: He was up in our office
17 looking to use our fax machine.

18 MR. MULLINS: We've been looking for
19 Mr. Streeter, and none of us can find him.

20 JUDGE NELSON: Let's take a break and I'll
21 see if I can find out if he's still up there.

22 MR. PERGOLIZZI: Your Honor, if I may, we

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1 have what we think is a very straightforward, first of
2 all, notice issue. And even if we got beyond the
3 notice issue, we'd like to believe we could resolve
4 our issue relatively quickly. And rather than -- we
5 would appreciate it if that could be moved up on the
6 agenda as well.

7 MR. NORTON: We have no objection.

8 JUDGE NELSON: We'll take that, too. But,
9 first, let's see if we can find Mr. Streeter. Let's
10 go off the record for a moment.

11 (Whereupon, off the record briefly.)

12 JUDGE NELSON: Mr. Pergolizzi, now your
13 client is who?

14 MR. PERGOLIZZI: Texas Utilities Electric
15 Company.

16 JUDGE NELSON: What are they?

17 MR. PERGOLIZZI: They are a utility
18 company that has filed comments in this proceeding.
19 We have received the 12th set of interrogatories and
20 documents.

21 JUDGE NELSON: Are they a retail --

22 MR. PERGOLIZZI: Yes, they are. They sell

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1 both retail -- yes.

2 JUDGE NELSON: And where do they operate?

3 MR. PERGOLIZZI: They operate in the
4 southern -- southwestern -- southeastern part of
5 Texas. They operate approximately -- provide service
6 to about a third of the State of Texas.

7 JUDGE NELSON: Near Brownsville?

8 MR. PERGOLIZZI: That's one of the areas
9 they serve.

10 JUDGE NELSON: In that area?

11 MR. PERGOLIZZI: Yes.

12 JUDGE NELSON: Along the east coast?

13 MR. PERGOLIZZI: I believe they do extend
14 down into that area to some extent.

15 JUDGE NELSON: And what do they have to do
16 with this case?

17 MR. PERGOLIZZI: Well, we filed comments
18 on the 29th relating principally to one of our plants,
19 the Martin Lake facility. And that facility is the
20 facility that currently burns lignite. They have not
21 received any Tidal River Basin coal on a rail.

22 JUDGE NELSON: Let me get the map out.

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1 MR. PERGOLIZZI: That plant is located
2 near Henderson.

3 JUDGE NELSON: Now, are you nearer Houston
4 or nearer Brownsville?

5 MR. PERGOLIZZI: I think they would be
6 nearer to Houston. If I could come --

7 JUDGE NELSON: Sure. Want to show me on
8 the map?

9 MR. NORTON: Your Honor, I think for the
10 question at hand, which is quite narrow but --

11 JUDGE NELSON: All right. Mr. Pergolizzi
12 is pointing out an area that is served by this
13 utility. And you're on the lines of the UP.

14 MR. PERGOLIZZI: Well, no, we're not
15 currently. But they are in the process of --

16 JUDGE NELSON: Building?

17 MR. PERGOLIZZI: -- building out to the
18 UP.

19 JUDGE NELSON: Are you on any railroad
20 line?

21 MR. PERGOLIZZI: They receive destination
22 service currently by the Santa Fe Railroad, which the

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1 problem that TU faces in this proceeding is that,
2 prospectively, it is more of a prospective problem.
3 Upon building out to the UP, in the absence of a
4 merger, they would be able to get their coal via a
5 direct UP/SP rail -- I'm sorry, via a direct UP rail.

6 Their alternative would be to take coal
7 via the BN through BN/KCS and through Shreveport,
8 where they would interchange with the SP to Tanaha,
9 which is a point located in the general area I've
10 pointed out to you. And then, it would travel on the
11 SP -- I'm sorry, it would travel between Shreveport
12 and Tanaha on the SP, and then the BN and Santa Fe
13 would pick it up in Tanaha and deliver it to the
14 plant.

15 So our concern here is that with the
16 merger the --

17 JUDGE NELSON: You want the more direct
18 service.

19 MR. PERGOLIZZI: Right.

20 JUDGE NELSON: That they are now building.

21 MR. PERGOLIZZI: And we'd like to preserve
22 the competitive option of the BN/KCS/SP, and we've

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1 asked for trackage rights over the Shreveport to
2 Tanaha line. So that the SP would still participate
3 -- I'm sorry, so that competitive option BN/KCS
4 through Shreveport would be available for competition
5 with the direct UP movement.

6 The issue that we are here today over is
7 we received a 12th set of interrogatories and document
8 requests.

9 JUDGE NELSON: And you filed -- you made
10 a submission on the 29th.

11 MR. PERGOLIZZI: We filed a submission on
12 the 29th.

13 JUDGE NELSON: Which says all of these
14 things.

15 MR. PERGOLIZZI: Right.

16 JUDGE NELSON: We have submitted over a
17 thousand pages of documents in response to prior
18 requests. We have answered interrogatories. We have
19 made all three of our witnesses available for
20 deposition. We have answered a second set of
21 interrogatories.

22 And then, on April 16th at about 7:00 at

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1 night, we received a new set, a 12th set, of
2 interrogatories and document requests, which included
3 some entirely new interrogatories, entirely new
4 document requests, which we believe are untimely in
5 this proceeding.

6 We had some discussions with counsel at
7 Covington & Burling yesterday about our concerns over
8 those requests. And we received a letter then late
9 last night from Mr. Norton indicating that he intended
10 to raise the issue of whether we had to respond on
11 their timeframe, that he intended to raise that issue
12 at this hearing.

13 We believe that that issue has not
14 properly been raised for resolution at this hearing.
15 We haven't had an opportunity even to talk about the
16 request with our client. We haven't had an
17 opportunity to file our objections. We think that the
18 proper thing would be to defer this until we've had a
19 chance to file our objections and take the matter
20 up --

21 JUDGE NELSON: When would you be ready
22 with your response?

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1 MR. PERGOLIZZI: Well, we will be filing
2 our objections. We believe the proper timeframe is
3 the one set forth in the discovery guidelines, which
4 would require us to file our objections on Tuesday.

5 JUDGE NELSON: So we could meet on
6 Wednesday.

7 MR. PERGOLIZZI: That would be correct.

8 MR. NORTON: Your Honor?

9 JUDGE NELSON: Mr. Streeter is on the
10 phone with his client and will be down when he
11 finishes.

12 MR. NORTON: Your Honor, if I might just
13 provide a little further background on this issue.
14 Back at the March 8 hearing when you ruled on phase
15 one and phase two, you directed that in the phase two
16 discovery the responses would be due in an accelerated
17 six-day -- six calendar day timeframe, recognizing
18 that we had only a limited period of time for replying
19 to the March 29 filings.

20 We have included that in all of the
21 discovery requests that we have served since. That
22 has been included in several of the ones that you have

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1 reviewed in order to be answered by Cen-Tex -- South
2 Orient, for example, and yesterday Procter and Gamble.

3 Most parties have responded. They may
4 have asserted objections to it, but most have
5 responded within essentially that timeframe. Some
6 asserted that they were going to take the full
7 15 days. And rather than make an issue of it if we
8 were going to get the material soon enough so that we
9 could still use it, we'd try to work something out.

10 We're at a point now where if they take
11 the full 15 days, which is what they said they
12 intended to do, it will be too late for us to make any
13 use of that.

14 JUDGE NELSON: When were these
15 interrogatories served?

16 MR. PERGOLIZZI: The 16th, I believe.

17 MR. NORTON: The 16th and 17th.

18 JUDGE NELSON: Do I have them here? Are
19 they in this book?

20 MR. NORTON: I have a copy right here, the
21 12th set. This is not the 12th set of TUE. This is
22 just the 12th generic set, and they were included in

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1 several of them. These relate specifically to TUE.

2 JUDGE NELSON: So the 12th set directed
3 to --

4 MR. PERGOLIZZI: Your Honor, it's directed
5 to a number of parties. TUE was one of the parties.

6 JUDGE NELSON: Where would I see that?

7 MR. PERGOLIZZI: It's difficult to
8 understand because --

9 MR. NORTON: Well, in each --

10 JUDGE NELSON: How do I tell who has
11 received this?

12 MR. NORTON: It is -- there is a --
13 actually, I think there may be a table missing. But
14 each question designates by the acronym the --

15 JUDGE NELSON: I see. I see TUE in
16 parentheses after some of these.

17 MR. NORTON: And then I believe there was
18 also a separate table that -- or listing that --

19 JUDGE NELSON: All right. So the problem
20 starts with a set of discovery requests, which by its
21 nature if the full time is taken can't be answered in
22 time to do anybody any good.

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1 MR. NORTON: That's correct.

2 JUDGE NELSON: So you're here to see if
3 you can't speed up the response time, in the first
4 instance.

5 MR. NORTON: Well, that's correct. Or
6 have them respond in a timeframe that everyone else
7 has been basically responding to, and has been part of
8 this second phase.

9 JUDGE NELSON: Well, I don't care about
10 everyone else. He is here and I'm dealing with his
11 problems now.

12 MR. NORTON: That's fine.

13 JUDGE NELSON: So this is really a request
14 by the Applicants for a shortened discovery response.

15 MR. NORTON: Well, no, not necessarily,
16 Your Honor. We have proceeded on the understanding
17 that in directing that the responses in the phase two
18 discovery be provided within the six calendar days,
19 that that has applied across the board to these
20 requests.

21 JUDGE NELSON: That was in my order?

22 MR. NORTON: That was in the March 8th

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1 hearing, yes.

2 JUDGE NELSON: Six calendar days.

3 MR. NORTON: Right.

4 JUDGE NELSON: So if we apply that rule to
5 TUE, when would they be due?

6 MR. PERGOLIZZI: They would be -- that's
7 the very -- that is the issue. It's whether or --

8 JUDGE NELSON: Well, that's what we're
9 here to deal with. When would that time run?

10 MR. NORTON: That would be the 22nd, which
11 is Monday.

12 JUDGE NELSON: Monday. And he wants
13 Tuesday, and you want Monday. And the whole case is
14 about one day?

15 MR. NORTON: No, no, no, no. The
16 difference is that he's saying he will file objections
17 on Tuesday.

18 MR. PERGOLIZZI: If I can have --

19 MR. NORTON: If six days is the response,
20 not only objections --

21 JUDGE NELSON: He doesn't sound like an
22 objector to me. He says he has turned over thousands

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1 of documents already.

2 MR. NORTON: Well, he has --

3 JUDGE NELSON: It's not recalcitrant.

4 MR. PERGOLIZZI: If I can explain, I think
5 the fundamental problem here is that at the March 8th
6 ruling you were dealing with a set of interrogatories
7 that a number of parties objected to, including TU
8 Electric, as premature. Your order only directed that
9 as to those overbroad requests the Applicants would
10 refocus/reformulate those specific requests and
11 reserve them.

12 The parties were then given six days to
13 respond to those reformulated, refocused requests,
14 which you identified as the second phase. This six-
15 day timeframe was selected because -- two reasons.
16 One, recognizing that the parties had had the broader
17 requests in their hands for some 15 days already, and
18 also with the understanding that there would be a
19 discovery conference on the 12th.

20 JUDGE NELSON: I get your point, that the
21 six days applied to already pending requests.

22 MR. PERGOLIZZI: Right. And these --

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1 JUDGE NELSON: And have been put into
2 phase two.

3 MR. PERGOLIZZI: -- are absolutely new
4 requests. And with regard to the question of what
5 other --

6 JUDGE NELSON: Well, let's put history to
7 one side. We now have the 12th set. We have the
8 given schedule set by the Commission. What do we do
9 about it?

10 MR. PERGOLIZZI: Well, I think they're
11 untimely, and I don't -- and I believe we ought to --

12 JUDGE NELSON: Under what rule?

13 MR. PERGOLIZZI: Well, under the discovery
14 guidelines, which require that they respond -- that
15 they follow discovery and give us 15 days to respond
16 -- the same 15 days that we allowed them in responding
17 to all of our requests.

18 JUDGE NELSON: I see. They have trapped
19 themselves.

20 MR. PERGOLIZZI: Well, and, in fact, this
21 is exactly an objection that Harkins Cunningham raised
22 on behalf of SP in the last merger case and happened

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1 to have their objections to the Arizona Electric Power
2 Cooperative.

3 JUDGE NELSON: Well, you know what I think
4 about this? It's going to turn on how sweeping these
5 requests are and how willing you are to come up with
6 documents.

7 MR. NORTON: Your Honor, on the --

8 JUDGE NELSON: If I start to see narrowly
9 focused, carefully drawn requests, and I get from you
10 a feeling of responsiveness to them, that's one
11 problem. If I see requests for every paper dealing
12 with the history of the utility from day one, and I
13 hear on you -- from your side everything from the
14 constitution on down, then we've got another kind of
15 a problem. So can you educate me on what we're really
16 talking about here?

17 MR. PERGOLIZZI: Well, I do think that
18 part of the problem here is that we have been asked to
19 go back to this client several times, as have many
20 other parties here. We have produced a great volume
21 of documents in all of these requests, and every
22 single one of them could have been asked two weeks ago

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1 at least. And with that -- in that regard, we think
2 they are all burdensome for us to respond to.

3 I can talk to Mr. Bulgozdy and mention --
4 and noted that there are a couple that may be easy to
5 respond to, but that doesn't change the fact that the
6 Applicants have waived their right to this discovery.
7 That is the very position they advanced in the --

8 JUDGE NELSON: Well, if they're in the
9 position of, one way or another, asking me to order a
10 response sooner rather than later, then maybe they're
11 entitled to that relief as to some of them. You know,
12 this is not a game. The public interest is at stake
13 here, and this matter of the coal transportation is an
14 important issue in the case.

15 MR. NORTON: Your Honor, we --

16 JUDGE NELSON: I don't want to see it go
17 blowing away because of some technical dispute.

18 MR. NORTON: We indicated, Your Honor,
19 that if we could get their substantive responses by
20 Wednesday, that would be satisfactory.

21 JUDGE NELSON: What do you mean by
22 "substantive responses"?

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1 MR. NORTON: You know, documents or the
2 information that -- the answers to the
3 interrogatories, not merely objections. And if we --

4 JUDGE NELSON: Well, what if they have a
5 mix of --

6 MR. NORTON: Well, we'd be willing --

7 JUDGE NELSON: -- willingness and
8 objections?

9 MR. NORTON: We will be perfectly willing
10 to talk with them every day between now and then to
11 try to obviate the objections, narrow things if they
12 are burdensome. We tried to draw these in a focused
13 and narrow way. If they are further narrowing, we'd
14 be happy to do it.

15 MR. PERGOLIZZI: Well, again, Your Honor,
16 all of the requests could have -- should have been
17 asked. In essence, what they're asking you to do is
18 to abrogate the discovery guidelines, which the rules
19 and everyone knew applied to this case. And I believe
20 that other parties have been given the full 15 days
21 when new requests have been submitted, and I believe
22 that other people have --

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1 JUDGE NELSON: Well, this same request, on
2 its face, is directed to other parties.

3 MR. PERGOLIZZI: Which request are you
4 referring to?

5 JUDGE NELSON: The 12th set.

6 MR. PERGOLIZZI: Right. I guess
7 principally what -- I should add also that with regard
8 to the ones that are common, there has been some
9 effort to -- we not only have given them documents in
10 response to other requests; we have agreed to give
11 them some limited responses to this document request,
12 which pertained to Mr. Crowley's statement, who was
13 scheduled to be deposed on Monday. So it's not as if
14 we had decided to just take a hard line and depose
15 everything. We --

16 JUDGE NELSON: Who is Mr. Crowley?

17 MR. PERGOLIZZI: He is a witness on behalf
18 of approximately 11 parties in this case. He has
19 submitted a number of verified statements.

20 JUDGE NELSON: Are you one of the parties
21 sponsoring Mr. Crowley?

22 MR. PERGOLIZZI: Yes, we are.

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1 JUDGE NELSON: And his deposition is being
2 taken.

3 MR. PERGOLIZZI: His deposition is
4 being --

5 JUDGE NELSON: And when is that
6 deposition?

7 MR. PERGOLIZZI: That is on Monday, and
8 we've agreed to provide responses with respect to the
9 questions specific to Mr. Crowley.

10 JUDGE NELSON: Are they included in the
11 12th --

12 MR. PERGOLIZZI: Yes, they are. The
13 specific ones that are issues --

14 JUDGE NELSON: Well, what's left, then?

15 MR. PERGOLIZZI: Interrogatory 7,
16 Interrogatory 8, 9, and 10, and then Document Requests
17 1 through 6.

18 JUDGE NELSON: Let's look at these.
19 Number 7 deals with a study. Do they have the study?

20 MR. PERGOLIZZI: The study was included in
21 the comments. Again, they could have asked for
22 followup the next day. They chose not to. The

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1 information they're requesting, we believe, would take
2 time to put -- pull together.

3 JUDGE NELSON: You want them to take stuff
4 in the study, and recast it in tabular form, and break
5 down categories and subcategories?

6 MR. NORTON: We're asking for a --

7 JUDGE NELSON: On very short notice?

8 MR. NORTON: Well, to the extent that they
9 can -- it's reasonably available to them. If it's
10 not, then obviously they can't do it. We're not
11 asking the impossible.

12 MR. PERGOLIZZI: Your Honor, we think it's
13 a burden to even ask this client -- to have to go back
14 to them a third time to ask them to approve files, to
15 do -- UP seems to have the impression that this party
16 is designed to facilitate their interests, that
17 everyone is supposed to drop what they are doing and
18 to get on this abbreviated/expedited schedule to
19 accommodate their needs.

20 They had plenty of time to ask these
21 questions. They chose not to. They sat on their
22 rights. I believe I heard Mr. Norton advancing the

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1 waiver claim against parties this morning on that very
2 basis.

3 JUDGE NELSON: Are you prepared to cut
4 these down some --

5 MR. NORTON: Yes.

6 JUDGE NELSON: -- Mr. Norton?

7 MR. NORTON: And we told them we would be
8 happy to talk -- to try to limit them, if they --
9 where they had problems, so that we could get
10 something out to --

11 JUDGE NELSON: Are you prepared to consult
12 with the client? The client is where, in Texas?

13 MR. PERGOLIZZI: The client is in Texas.

14 JUDGE NELSON: Can you talk to them about
15 this and see what we can work out over the lunch
16 recess in terms of what you can do without undue
17 burden?

18 MR. PERGOLIZZI: We can attempt to --

19 JUDGE NELSON: What looks troublesome,
20 what doesn't. I have no idea here of what the
21 responses would be, see, to them.

22 MR. PERGOLIZZI: Right. And as I

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1 attempted -- that's one of the reasons I thought it
2 would be better to defer this issue, because we
3 haven't had the opportunity to do that yet. But,
4 again --

5 JUDGE NELSON: You want to defer it until
6 Tuesday.

7 MR. PERGOLIZZI: Right.

8 JUDGE NELSON: Then, suppose I order some
9 production.

10 MR. PERGOLIZZI: We'll do it as quickly as
11 we can, but --

12 JUDGE NELSON: He's got a filing to make.
13 He has to go to the printer the end of next week.

14 MR. PERGOLIZZI: Part of that is a problem
15 that is being created by the Applicants, not by TU
16 Electric. We have asked them to search their files
17 two times already. Other parties have been put in the
18 same position.

19 When we're talking about accommodating an
20 interest in abbreviating a deposition, we've been
21 willing to --

22 JUDGE NELSON: Where is the deposition

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1 being taken of this witness?

2 MR. PERGOLIZZI: That's in Washington.

3 JUDGE NELSON: Do you have the capability
4 to be in two places at the same time?

5 MR. PERGOLIZZI: I do not.

6 JUDGE NELSON: Is there someone in the
7 firm that could be here Monday if we --

8 MR. PERGOLIZZI: I assume that would be
9 possible.

10 JUDGE NELSON: If I sped this up to
11 Monday.

12 MR. PERGOLIZZI: I would prefer to be here
13 myself. And, again, I think that the issue --

14 JUDGE NELSON: Well, are you going to
15 defend the deposition?

16 MR. PERGOLIZZI: Yes, I am.

17 JUDGE NELSON: Are you like the lead for
18 these purposes?

19 MR. PERGOLIZZI: I am for WCTL, TU
20 Electric, Wisconsin -- for four parties I will be the
21 lead defender of Mr. Crowley.

22 JUDGE NELSON: What happens if we put this

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1 off until Tuesday?

2 MR. NORTON: Well, Your Honor, we're then
3 in the -- first, we think we have proceeded properly
4 with the six-day turnaround, so that --

5 JUDGE NELSON: Let's not take time with
6 that point. We are where we are. We have the 12th
7 set of discovery. I want to try to work out something
8 with it.

9 MR. NORTON: That's correct.

10 JUDGE NELSON: What can we do with it?

11 MR. NORTON: If we go until Tuesday, we're
12 put in the position where if they have to respond for
13 it to be useful to us, we have to have it the next
14 day. If they can represent that they will be able to
15 respond the next day, if ordered, that's fine. But I
16 don't know that they're going to be able to do that.

17 MR. PERGOLIZZI: Your Honor, none of these
18 requests can be answered. I've tried to explain this
19 to both Mr. Norton and Mr. Bulgozdy. We can't answer
20 many of these requests. If you ordered me to produce
21 the documents on Tuesday, it won't happen. It's -- no
22 matter what I did, you would not get some of these

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1 answers.

2 JUDGE NELSON: What can you do by then?

3 MR. PERGOLIZZI: By Tuesday? We will have
4 our objections. We, as I mentioned, I think can give
5 some of the narrow information, although again I
6 emphasize that we think it is highly unfair to not
7 only TU Electric but all shippers in this proceeding
8 to be burdened with responding to untimely discovery.

9 JUDGE NELSON: Well, again, let me ask
10 Mr. Norton, in view of the time situation we find
11 ourselves in, aren't you willing to go through these
12 and cut some of them out, or cut them down, to try and
13 make --

14 MR. NORTON: Yes, absolutely.

15 JUDGE NELSON: -- work easier for TUE
16 here?

17 MR. NORTON: Absolutely. We have proposed
18 to do that. But they have -- they were not -- we're
19 prepared to do that this afternoon.

20 JUDGE NELSON: Let's try to do that. Are
21 you available to meet with Mr. Norton to scale this
22 stuff down?

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1 MR. PERGOLIZZI: We could, Your Honor.

2 JUDGE NELSON: So we then know what we're
3 dealing with?

4 MR. PERGOLIZZI: I guess we could, but I
5 think we need some clarification as well on whether
6 the discovery guidelines are no longer in effect. I
7 think that is a serious issue which affects many
8 parties.

9 JUDGE NELSON: Well, let's assume they're
10 in effect full force. Let's further assume that I
11 have the power for good cause shown to alter, amend,
12 modify, or revoke them, which I think I do. Let us
13 further assume that good cause has been shown and that
14 I'm trying to work out something that will enable the
15 TUE to make some kind of meaningful response to some
16 of the questions set out in the 12th set of discovery
17 requests. Are you with me so far?

18 MR. PERGOLIZZI: Right.

19 JUDGE NELSON: That being the case, it is
20 in my discretion to try to fashion some machinery. I
21 can't expect you to do the impossible. If Mr. Norton
22 stands there and insists on every shred and every

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1 document, he is going to be foolish because he isn't
2 going to get that. Tactically, he is not going to get
3 it from me. Practically, he isn't going to get it
4 from you in time to do him any good.

5 So what I'm trying to suggest to you
6 gentlemen is to work out something whereby some
7 documents or information can change hands. It is
8 going to be less than you want, Mr. Norton. It's
9 going to be more than you want to turn over, because
10 you believe you don't have to turn over anything.

11 And my suggestion to both is to try to
12 work out something, and you may well want to talk to
13 the client and see what shape the files are in, which
14 ones pose problems, which don't, and then give me a
15 suggestion when we come back in here after lunch.

16 MR. PERGOLIZZI: It might -- if I could,
17 Your Honor, I'd ask that we have --

18 JUDGE NELSON: Mr. Dowd is working with
19 you in this matter?

20 MR. DOWD: Can we go off for just a few
21 minutes?

22 JUDGE NELSON: Any objection to --

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1 MR. DOWD: Can we go off the record for
2 just a few minutes?

3 JUDGE NELSON: Do you want to go off the
4 record or --

5 MR. DOWD: I'd like to confer with --

6 JUDGE NELSON: Of course.

7 MR. DOWD: -- Mr. Pergolizzi, and then we
8 may be able to come up with an idea that not only --

9 JUDGE NELSON: Why don't we -- I saw
10 Mr. Streeter here before.

11 (Laughter.)

12 Now he is gone again.

13 MR. MULLINS: He went out with
14 Mr. Mullins. Perhaps they're just outside conferring.

15 JUDGE NELSON: Let's defer this matter so
16 counsel can confer, and then you'll report to me on
17 what's going on.

18 Well, somewhere along the line, I have to
19 see Ms. Metallo's document here, and look at it, and
20 it's hard to do that right here with everybody here.

21 MR. NORTON: We'd be happy to have --

22 JUDGE NELSON: We're sitting here waiting.

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1 I need to sit in the office and read it.

2 MR. NORTON: We could vacate. We could
3 divert our eyes.

4 JUDGE NELSON: What else do we have?

5 MR. NORTON: There is a question
6 concerning Justice Department backup and work papers
7 relating to their verified statements that we could
8 turn to.

9 JUDGE NELSON: Let's turn to that, then.
10 Before we turn to it, here is Mr. Streeter and
11 Mr. Mullins. Are we ready to deal with the question
12 of the confidentiality of the document?

13 MR. MULLINS: We are, Your Honor.

14 JUDGE NELSON: Can I see it again now,
15 because I can't -- unless there's a solution. I've
16 forgotten it.

17 MR. MULLINS: There might have been, but,
18 Gerry, it's not going to work, unfortunately. So
19 we're prepared to go forward.

20 JUDGE NELSON: All right. We're on the
21 record. This is this memorandum from Mr. Haverty to
22 Mr. Emmett, and the question is whether it has to be

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1 released or not. And the argument against release is
2 what? Mr. Streeter?

3 MR. STREETER: Well, if I may state our
4 position, I have now spoken with Commissioner Matthews
5 and with his legal staff at the Texas Railroad
6 Commission. Number one, they had not seen the
7 memorandum, so I took the liberty of asking your
8 assistant to fax --

9 JUDGE NELSON: I saw you in our office and
10 helped you to get it faxed.

11 MR. STREETER: Yes.

12 JUDGE NELSON: I agree.

13 MR. STREETER: And so it was faxed down.
14 They have reviewed it. They had seen the letter of
15 March 15th. They did confirm again that they had
16 never seen the memorandum of March 19th. Commissioner
17 Matthews has asked that I make a couple of things
18 very, very clear. Number one, the idea of the neutral
19 switching railroad is one that has been worked on for
20 some time.

21 They had had a public hearing, apparently,
22 in the metroplex area, which is Dallas, Fort Worth,

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1 Garland. And, apparently, Mr. Haverty must have
2 gotten word of that and sent the letter to respond,
3 for whatever that is worth.

4 It's an open process. The Railroad
5 Commission was asked by the Governor of Texas --

6 JUDGE NELSON: Well, there's no privacy in
7 that.

8 MR. STREETER: No, none at all.

9 JUDGE NELSON: Right.

10 MR. STREETER: The Governor of Texas asked
11 the Railroad Commission to, in effect, go out and turn
12 over every bush and leaf and everything in Texas to
13 find out what the shippers in Texas felt about this.

14 So, as a result, the Commissioners not
15 only talked to the KCS people, to Conrail, they talked
16 at length with Mr. Dick Davidson, with Mr. Krebs. The
17 night before the Commission was voting, for example,
18 Mr. Davidson was in with Commissioner Matthews and
19 was, in effect, saying, "Look, the agreement that we
20 have with BN, I've got my lawyers in Omaha. Krebs has
21 got his in Fort Worth. We'll bring them down here.
22 We'll rework the entire agreement. But, you know, we

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1 want you to support the merger." It was heavily
2 lobbied.

3 Now, beyond that, the next paragraph --

4 JUDGE NELSON: Who was getting the lobby?
5 The Texas Commission, you mean?

6 MR. STREETER: Yes.

7 JUDGE NELSON: Yes.

8 MR. STREETER: Yeah. They held public
9 hearings --

10 JUDGE NELSON: So the Applicants were
11 lobbying for support, and the KCS was lobbying for
12 opposition.

13 MR. STREETER: That's right. And then, on
14 top of it, the Commission --

15 JUDGE NELSON: I don't see anything
16 confidential so far.

17 MR. STREETER: Well, there -- that --

18 JUDGE NELSON: That's just life in
19 America.

20 MR. STREETER: That's right. And this is
21 the government process at work.

22 JUDGE NELSON: Exactly.

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1 MR. STREETER: And the Texas Railroad
2 Commission trying to get down to the bottom of whether
3 this is good for Texas.

4 JUDGE NELSON: So what's the secrecy?

5 MR. STREETER: We don't care.

6 JUDGE NELSON: All right.

7 MR. STREETER: I mean, that's the bottom
8 line. But he did want to make one other comment,
9 which is that the third paragraph of the March 19th
10 memorandum --

11 JUDGE NELSON: Yes.

12 MR. STREETER: -- is a slight misstatement
13 of what Commissioner Matthews was saying.

14 JUDGE NELSON: Well, the record will show
15 that you're saying that, and you can correct it if you
16 want.

17 MR. STREETER: And he would like to have
18 it made very clear that he kept his vote secret until
19 the morning of March 26th, that he did not tip his hat
20 to anyone. And I can tell you for a fact that on the
21 -- I believe it was the 18th of March, I met with the
22 Commissioner. When I walked out of there, I didn't

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1 know exactly what position the Commission was going to
2 take, whether it would be unanimous, whether it would
3 be two to one, whether it would go the other way.

4 So if their own counsel didn't know, and
5 the only way I found out about it was a phone call
6 that I got the morning of March 26th saying that they
7 had unanimously decided that the merger, as proposed,
8 is contrary to the public interest. But -- and then
9 they had created certain conditions, including the
10 neutral terminal.

11 But in terms of this -- that he would like
12 to hear from some top management people of companies
13 out at headquarter of Texas that do business, I would
14 express to him that UP trackage rights are not
15 sufficient competition. That is a misstatement of
16 what he said. He said that he wanted to get
17 information concerning whether it was good, bad, or
18 indifferent, and that's basically all of the light I
19 can shed on this.

20 We really don't care if it is released and
21 made public. You know, we'll have to live with the
22 fact that Mr. Haverty may have been stretching the

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1 point to make with Mr. Emmett. But it's -- from that
2 standpoint, if they want to take our depositions,
3 Mr. Matthews is more than willing to come in and say
4 exactly what he said on the record.

5 JUDGE NELSON: If it's released, you can
6 always file something that says whatever you want it
7 to say, or nothing.

8 MR. STREETER: Thank you.

9 MR. NORTON: So who is it that wants
10 protection of this document?

11 MR. MULLINS: Your Honor, it's Mr. Haverty
12 at KCS. And let me explain what we're talking about.

13 JUDGE NELSON: How does Mr. Emmett of the
14 NIT League feel about it?

15 MR. MORENO: Well, Mr. Emmett was the
16 recipient of the document.

17 JUDGE NELSON: That's correct.

18 MR. MORENO: And at the time when he
19 received the document, it was believed that this was
20 a confidential communication.

21 JUDGE NELSON: What does he feel now?

22 MR. MORENO: At this point now, he does

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1 not necessarily believe it is confidential.

2 JUDGE NELSON: Does he care about all of
3 this?

4 MR. MORENO: No, he does not care one way
5 or the other.

6 JUDGE NELSON: All right. So the only
7 person who cares is Mr. Haverty?

8 MR. MULLINS: Not necessarily. The
9 Applicants, obviously, care or we wouldn't be in here.

10 JUDGE NELSON: I'm talking about release.

11 MR. MULLINS: They're the ones who want
12 to --

13 JUDGE NELSON: The only one who has a
14 problem with release is Mr. Haverty.

15 MR. MULLINS: Well, let me explain what
16 you mean by "release," though, Judge. What we're
17 talking about here is, again, there is three
18 categories of the protective order.

19 JUDGE NELSON: I understood all of that
20 yesterday.

21 MR. MULLINS: There is highly
22 confidential, confidential, and --

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1 JUDGE NELSON: The object is to move this
2 from the box called confidential into the public box.

3 MR. MULLINS: Right, because they want
4 to --

5 JUDGE NELSON: And Mr. Haverty objects to
6 that.

7 MR. MULLINS: That's correct. And they
8 want to make that public, and he objects to that
9 because he wrote this in confidence to Mr. Emmett.
10 And if you establish the principle that once a
11 communication from one party to another party, written
12 in confidence, is released to the public, they will
13 start going after every other item.

14 Now, they themselves have refused to
15 produce similar type documents. And I might add
16 that --

17 JUDGE NELSON: Well, they're not in front
18 of me right now.

19 MR. MULLINS: Well, I --

20 JUDGE NELSON: What I've got here now is
21 this March 19th --

22 MR. MULLINS: Right.

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1 JUDGE NELSON: -- document.

2 MR. MULLINS: Yes. And I want to show you
3 various documents, Judge Nelson, that they themselves
4 have marked confidential that are more public than a
5 private communication between --

6 JUDGE NELSON: Well --

7 MR. MULLINS: -- two parties.

8 JUDGE NELSON: You haven't moved to
9 declassify them, so I'm not looking for -- to wake
10 sleeping --

11 MR. MULLINS: Well, we --

12 JUDGE NELSON: I want to deal with this
13 one document.

14 MR. MULLINS: We actually were -- made an
15 issue of it in our filing, and we've also made an
16 issue of it with the Applicants. They themselves
17 stood forth on the confidential designation on many,
18 many, many documents. For example --

19 JUDGE NELSON: Anyone can always make a
20 motion, and if there's a motion, I guess anywhere in
21 the case, to declassify something I'll hear it.

22 MR. MULLINS: Well --

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1 JUDGE NELSON: Right now, the only thing
2 that is in front of me is this one.

3 MR. MULLINS: They have marked SEC filings
4 confidential, public SEC filings. So all we're
5 talking about here is their right to put it in the
6 public section of their brief versus the confidential
7 section. They have the document. They can use it.
8 They can make whatever use they want to make of it in
9 their filing.

10 All the big argument here is they want to
11 move it from the volume that says confidential to the
12 volume that says public. And the burden should be on
13 them to establish that the confidential classification
14 is incorrect. And they have not made any argument,
15 any reason why their case is hampered by the
16 confidential designation.

17 JUDGE NELSON: Is that it?

18 MR. MULLINS: That's it. I believe you
19 should --

20 JUDGE NELSON: I'm going to order
21 production of the memorandum dated March 19th, with
22 redaction of the name Michael R. Haverty, and the

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1 number 806-556-0927, which I take it is a phone number
2 or identifying detail of some kind. You may redact
3 that.

4 On the second page, who are these people
5 who got copies? Watkins and Wood?

6 MR. MULLINS: One is the lawyer retained
7 by KCS, and the other is a marketing person in KCS.

8 JUDGE NELSON: I don't see any
9 significance to any public disclosure of those names
10 one way or the other, so let them go public. So, so
11 far we are redacting the name of the author and the
12 phone number.

13 The letter from the Governor to Ms. Morgan
14 is already public, I understand.

15 MR. MULLINS: Correct. We have no
16 objection with the other --

17 JUDGE NELSON: And the March 15th letter,
18 are you objecting to that one as a letter from
19 Mr. Haverty to Commissioner Matthews? I'm willing to
20 redact and protect the office identity if you wish.

21 MR. MULLINS: We would appreciate that.

22 JUDGE NELSON: Then we'll take from --

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1 where the letterhead gives his name and title --

2 MR. MULLINS: Yes.

3 JUDGE NELSON: See it printed up there?

4 MR. MULLINS: That's correct.

5 JUDGE NELSON: White that out.

6 MR. MULLINS: Okay.

7 JUDGE NELSON: And then you may white out
8 his signature, his name.

9 MR. MULLINS: Okay.

10 JUDGE NELSON: I don't see any other
11 identifying details in there. Do you?

12 MR. MULLINS: Other than just that it's
13 the KCS --

14 JUDGE NELSON: That's correct. So the
15 world will know that someone from KCS authored these
16 documents. They will not know the name of the actual
17 person. And with that condition, I'm going to order
18 production of this document into the public category.

19 All right. What else do we have?

20 MR. PERGOLIZZI: Your Honor, if we could
21 return to --

22 JUDGE NELSON: TUE, yes.

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1 MR. PERGOLIZZI: TUE. Mr. Dowd and I have
2 taken another look at these requests, and I guess what
3 I would propose is that, for example, with regards to
4 Interrogatory Number 7, which we do believe requires
5 us to conduct a special study to provide information
6 related to the fuel study we included in our comments,
7 rather than do that special study we're willing to
8 look and see if there are any work papers associated
9 with that report that was included as our comments.
10 And to the extent they exist, we'll try to get those
11 over as soon as we can.

12 JUDGE NELSON: That should be fine.

13 MR. PERGOLIZZI: On --

14 JUDGE NELSON: So you don't have to take
15 some existing study, in the short time that's left,
16 and go into it and produce it in some new form. I'll
17 relieve you from that. But if you've got work papers
18 underlying the study, you'll produce them. And by
19 when will you get them in the hands of the Applicants?

20 MR. PERGOLIZZI: I can't guarantee that.
21 But I will do it as quickly as I can. I'd be happy to
22 talk to Mr. Norton about trying to work that out as

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1 quickly as --

2 JUDGE NELSON: Obviously, you realize time
3 is running and the sooner you get them there the
4 better.

5 MR. PERGOLIZZI: Right. I would add that
6 there may be issues of confidentiality, and we may
7 have other related objections. But we can try to work
8 those out.

9 JUDGE NELSON: Confidentiality in the
10 business sense, you mean?

11 MR. PERGOLIZZI: Well, for example, the --
12 yes.

13 JUDGE NELSON: Well, we have categories.
14 We have a highly confidential protection for that sort
15 of thing.

16 MR. PERGOLIZZI: Well, there are other
17 areas, such as mine head prices, which I don't believe
18 is an issue in this one, because I believe if you look
19 at the study it references delivered costs anyway.
20 And my guess is that that's not going to be an issue.

21 But we do have contracts with --

22 JUDGE NELSON: All right. So as to

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1 number 7, you will give the work papers --

2 MR. PERGOLIZZI: If they exist.

3 JUDGE NELSON: If there are work papers,
4 you will give them. That is, the work papers
5 underlying the Martin Lake fuel study. Okay.

6 What's next?

7 MR. PERGOLIZZI: Well, as to number 8, we
8 believe that some of that information is included in
9 what we've already provided -- for example, 8(c), the
10 coal quality. We can provide the -- we will make an
11 effort to provide some of the information here, and I
12 can, again, talk with Mr. Norton about what it's easy
13 to get our hands on, after I have a chance to consult
14 with my client.

15 JUDGE NELSON: Okay. Appreciate that.

16 MR. PERGOLIZZI: We think number 9 is one
17 of the very burdensome requests. This one is a
18 request for information that is equally available to
19 them as it is to us, and that's one that I think we'll
20 need to -- either they need to narrow or it should be
21 stricken.

22 JUDGE NELSON: We'll talk about 9. What

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1 else?

2 MR. PERGOLIZZI: Number 10, I think is one
3 that initially we need to just talk to our client and
4 see what exists, if anything.

5 JUDGE NELSON: Okay.

6 MR. PERGOLIZZI: And as to the document
7 request, I think that is basically the position we
8 have as well. To the extent that the Applicant can
9 offer suggestions to -- we will -- but first, I ask to
10 be given an opportunity to talk to the client. I
11 think rather than try to deal with this later today,
12 my time is better spent talking to the client. Plus,
13 as we've noted, we have this Crowley deposition on
14 Monday, and I need to -- the Applicants aren't the
15 only people that have time constraints. And I would
16 appreciate the opportunity to focus on that as well.

17 But I'm prepared to talk to them, to make
18 somebody available on Monday to talk to them if I'm
19 not available, about the status of what we're pulling
20 together. But, again, we think this is a highly
21 burdensome request. It sends us back to this client
22 for a third --

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1 JUDGE NELSON: What are you prepared to do
2 today with regard to the --

3 MR. PERGOLIZZI: Talk to the client and
4 find out as much as I can, gather whatever information
5 is readily available.

6 JUDGE NELSON: How about if you got back
7 to Mr. Norton at the end of the day --

8 MR. PERGOLIZZI: We could attempt to --

9 JUDGE NELSON: -- with a report on where
10 you stand.

11 MR. PERGOLIZZI: We could attempt to do
12 that. And if not the end of the day, certainly first
13 thing Monday.

14 JUDGE NELSON: Are people working Saturday
15 in this case?

16 MR. PERGOLIZZI: They may be. I would
17 like to avoid it if I can. The client -- it really
18 won't make much difference because the clients -- I
19 think it's asking a lot to suggest that TU Electric
20 has to bring in a weekend staff to go through their
21 files for UP.

22 JUDGE NELSON: No, I was thinking of you.

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1 MR. PERGOLIZZI: Well, I'm not going to be
2 in Texas.

3 JUDGE NELSON: Make a phone call.

4 MR. PERGOLIZZI: I'll have my phone call
5 made on Friday, but I won't have people to talk to on
6 Saturday. So whatever I find out today is going to be
7 as --

8 JUDGE NELSON: Well, why don't you just
9 make a report by the end of the day. Let's say -- how
10 late are you in the office today?

11 MR. PERGOLIZZI: Well, I'll try to do it
12 as soon as I can, and I'll make -- I'll get a message
13 to you one way or the other before the end of the day.

14 MR. NORTON: Or to John.

15 MR. PERGOLIZZI: Okay.

16 JUDGE NELSON: Talk to one of the two
17 counsel who are here, telling them exactly what you've
18 done so far, what you've learned. It may be, "I can't
19 get through to anyone. I get a busy signal."

20 MR. PERGOLIZZI: Your Honor, my
21 understanding also, though, is that -- and I think
22 this should be clear -- is that to the extent we are

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